

# **EXHIBIT 10**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

In Re: )  
PHARMACEUTICAL INDUSTRY ) CA No. 01-12257-PBS  
AVERAGE WHOLESAL PRICE ) MDL No. 1456  
LITIGATION ) Pages 4-1 - 4-137

BENCH TRIAL - DAY FOUR

BEFORE THE HONORABLE PATTI B. SARIS  
UNITED STATES DISTRICT JUDGE

United States District Court  
1 Courthouse Way, Courtroom 19  
Boston, Massachusetts  
November 13, 2006, 9:15 a.m.

LEE A. MARZILLI and TIMOTHY J. WILLETTE  
OFFICIAL COURT REPORTERS  
United States District Court  
1 Courthouse Way, Room 3205  
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1 THE COURT: Mr. Henderson is sitting back there, so  
 2 they can file -- we've oral argument on it.  
 3 Mr. Henderson, are you aware of all of this?  
 4 MR. HENDERSON: I became aware of it this morning,  
 5 your Honor, and some of the background, obviously, last week.  
 6 THE COURT: When I was reading the rule, one  
 7 thought occurred to me, which is that there are distinctions  
 8 when Government witnesses appear as fact witnesses as opposed  
 9 to about what happened internally to the Government, so that  
 10 was one line I was drawing in my own mind and I think what  
 11 makes some sense here is to have an argument on it.  
 12 MR. HENDERSON: I agree, your Honor. The  
 13 Government -- obviously they're calling -- they seek to call  
 14 Mr. Weintraub because of his position in the Government, not  
 15 because he's an expert in the industry. They have lots of  
 16 experts in the industry, your Honor. They've got lots of  
 17 people who have -- who have been working in the industry.  
 18 They want Mr. Weintraub because he's a former Government  
 19 employee. They want to know what he was doing and thinking  
 20 when he was in the Government, and it seems clear to us that  
 21 whatever testimony he might offer would be covered by the  
 22 privilege.  
 23 THE COURT: Well, would it make some sense to  
 24 script this in advance by doing two depositions, one of each,  
 25 and then the Government could object whenever there was a

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1 claim of deliberative process so I'd have actually a record  
 2 to start deciding based on it?  
 3 MR. HENDERSON: Well, in the Government's view, the  
 4 deposition testimony is covered by Touhy regulations.  
 5 THE COURT: Sure.  
 6 MR. HENDERSON: And HHS has denied the request for  
 7 testimony.  
 8 THE COURT: Here's my concern, Mr. Henderson. I  
 9 know they have, but now they're part of it and I'm likely to  
 10 have a trial at some point down the road on the Ben-A-Care --  
 11 is it Florida? -- two Ben-A-Care cases. What if I make a  
 12 decision in this incredibly important case and I don't have  
 13 the key Government witnesses? That seems a little like  
 14 cat-and-mouse.  
 15 MR. HENDERSON: A decision on what, your Honor? If  
 16 it's a decision on the meaning of the law and the  
 17 regulations --  
 18 THE COURT: Then I'm not going to let them ask  
 19 that.  
 20 MR. HENDERSON: Okay.  
 21 THE COURT: I mean, that's not fair game. I've  
 22 ruled as a matter of statutory construction on what "AWP"  
 23 means. There may be certain things about the industry. I'm  
 24 not sure Weintraub even would know that. Isn't he just  
 25 somebody in the White House, right? He's not --

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1 MR. MONTGOMERY: No, no. Jennings was in the White  
 2 House. Weintraub was with HCFA and CMS.  
 3 But, your Honor, we think the place to work out  
 4 these questions is here, not through direct contact with  
 5 witnesses and telling them they cannot appear. That's  
 6 improper it seems to us. So we agree your Honor that there  
 7 ought to be a way that we could do this by deposition.  
 8 THE COURT: Well, let's at least have oral argument  
 9 on it. Why don't you work out a time to have -- when would  
 10 you be prepared to respond?  
 11 MR. HENDERSON: It would have to be later this  
 12 week, your Honor, tomorrow or after -- tomorrow or Thursday  
 13 or Friday.  
 14 THE COURT: The big issue is to make sure they  
 15 understand I would not allow them to get into the  
 16 deliberative process privilege, why the agency did what it  
 17 did.  
 18 MR. HENDERSON: The Government's position also is,  
 19 your Honor, from a jurisdictional perspective, the defendants  
 20 need to file an independent APA action. Now, that can be  
 21 done --  
 22 THE COURT: Where, down there or here?  
 23 MR. HENDERSON: No, here. It can be done here.  
 24 THE COURT: I don't know the answer to that, but  
 25 there's for sure some review of the Administrative Procedure

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1 Act and I would want a written decision about why -- there's  
 2 certainly enough lawyers on it. If you want them to file  
 3 under the Administrative Procedure Act, I'm assuming you'll  
 4 see one this afternoon.  
 5 MR. HENDERSON: We did file a brief on this a while  
 6 ago. They don't have a Rule 45 subpoena to enforce. There's  
 7 no subpoena that they're seeking to enforce. And the two  
 8 situations where courts have authorized judicial review of  
 9 agency denials on Touhy requests is one where there's an APA  
 10 action and two in the situation where there's a request to  
 11 enforce a Rule 45 subpoena, not in the underlying case  
 12 itself.  
 13 THE COURT: Well, if you want to rest on that, file  
 14 an action.  
 15 MR. MONTGOMERY: But there's no reason to even go  
 16 to the Touhy piece of this problem if your Honor determines  
 17 that the Government is a party to the case, because everybody  
 18 agrees Touhy doesn't apply if the Government is a party.  
 19 THE COURT: Well, this is a gray area. It's a gray  
 20 area. They have the exact same suit, but it's a different  
 21 suit and it's up here as part of the multi-district, but it's  
 22 a separate suit. It's a gray area. So then we have, well,  
 23 what's the basis for them. I want to know, because it makes  
 24 no sense to me that I'm going to hear the same people in six  
 25 months.

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1 MR. BERMAN: Right.

2 THE COURT: And whether something is unfair and  
3 deceptive when you're dealing in the nonstatutory realm. In  
4 the statutory realm we can have our briefing, but in the  
5 nonstatutory realm, if in fact the industry understood they  
6 were being given the go-ahead, it may be a violation of  
7 statute, but not unfair and deceptive in the commercial  
8 world.

9 MR. HENDERSON: And if the Government was telling  
10 them that, they're entitled to that evidence.

11 THE COURT: Of course, it could be devastating to  
12 you if they say, "All we told them was, you know, 30 percent  
13 is in the ballpark" and you're getting a thousand percent or  
14 1400 percent. It may not help.

15 MR. MONTGOMERY: We'll have to see. But I hear  
16 Mr. Henderson conceding that perhaps there are some subjects  
17 as to which these witnesses can testify. You'll see in the  
18 letter that was sent to Mr. Weintraub that the Government's  
19 position is there is nothing on which you can testify.

20 THE COURT: Why don't you file your Administrative  
21 Procedure Act action, which they're conceding is the correct  
22 vehicle. You in the meantime -- I don't want to wait for  
23 that -- get your memo in. Maybe you can confer and figure  
24 out -- I respect the deliberative process privilege and I'm  
25 not going to transgress it, and one careful way of doing it

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1 might be a deposition so I can think about it and it's not  
2 fast off the bench as I'm thinking as we're going.

3 MR. HENDERSON: I would suggest that the defendants  
4 provide a list of questions, because their letters to the  
5 agency have been very vague and broad and virtually  
6 impossible in determining precisely what they want to elicit  
7 from the witnesses.

8 MR. MONTGOMERY: Your Honor --

9 THE COURT: You know what?

10 MR. MONTGOMERY: -- we're in a trial.

11 THE COURT: We're in the middle of warfare, you  
12 know, the combat of trial. We can't script it that way at  
13 this point. So why don't you file an opposition, you file  
14 your action, I'll have a hearing next week. I don't  
15 understand -- if it's nonbinding on the agency as part of its  
16 suit, which it would not be considered as an admission of a  
17 party opponent, right?

18 MR. MONTGOMERY: Yes, your Honor.

19 THE COURT: And if it's only about facts, in other  
20 words, communications back and forth as opposed to what the  
21 internal agency thought process was, which -- I'm thinking  
22 out loud. There may be other areas that are factual like  
23 that, but at least the noninternal piece of it. I'm not  
24 seeing, regardless of whether I say they're part of this  
25 litigation or not, what the problem would be.

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1 MR. HENDERSON: Very well.

2 THE COURT: Let me ask you this: Do you know  
3 whether they had communications with the industry? Did  
4 Weintraub?

5 MR. MONTGOMERY: I don't know about Weintraub.  
6 Certainly Jennings had many communications with the industry  
7 with members of Congress.

8 THE COURT: Like what? Make a proffer. Like what?

9 MR. MONTGOMERY: Well, I can't make the proffer  
10 because I've not been able to talk them. These witnesses are  
11 chilled, if you will, by what the Government --

12 THE COURT: So you don't even know what these  
13 people are going to say.

14 MR. HENDERSON: I object to Mr. Montgomery's  
15 characterization, your Honor.

16 MR. MONTGOMERY: On Weintraub, I think we have a  
17 better idea. I can't represent to you chapter and verse what  
18 he would have to say on that subject.

19 THE COURT: Why don't you talk to them?

20 MR. HENDERSON: We have, your Honor, and Mr.  
21 Montgomery has talked to them as well, and I understand with  
22 respect to Mr. Jennings. Mr. Jennings does not want to  
23 appear and come in court and testify.

24 THE COURT: Then he doesn't have to.

25 MR. HENDERSON: That's right. He has not been

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1 subpoenaed.

2 THE COURT: By the way, I'm not forcing them. I've  
3 been told they were voluntary witnesses.

4 MR. HENDERSON: Yes. I understand --

5 MR. MONTGOMERY: I said as to Mr. Jennings that he  
6 had not yet volunteered, but we were going to ask him. We  
7 are still in the process of asking him.

8 THE COURT: Well, if he doesn't want to come, that  
9 issue is over with. Now, what about Weintraub?

10 MR. HENDERSON: I understand Mr. Weintraub has been  
11 offered a significant fee for his testimony and isn't  
12 interested in testifying.

13 THE COURT: You can't pay a witness for testimony.

14 MR. MONTGOMERY: That is an extraordinary  
15 statement. Mr. Weintraub is a consultant. If anything has  
16 been offered to Mr. Weintraub, it's to reimburse him for his  
17 time lost coming here to testify.

18 THE COURT: Well, that's a whole other issue.

19 MR. MONTGOMERY: I am not privy to those  
20 communications with Mr. Weintraub.

21 MR. HENDERSON: He told us he was offered, I think,  
22 \$350 an hour for his testimony.

23 THE COURT: Well, that's a serious issue we'll have  
24 to vet.

25 MR. MONTGOMERY: And whatever he's been offered, of